In the High Court of Judicature at Madras

Dated: 22.8.2007

Coram:

The Honourable Mr.Justice F.M.Ibrahim Kalifulla
and
The Honourable Mrs.Justice R.Banumathi

W.A.Nos.689 and 690 of 2007

Ananda Kathirone .. Appellant in both the Writ Appeals

vs.

1. The Presiding Officer,
   Principal Labour Court,
   Chennai-104.

2. The Management of
   Addison and Company Limited,
   No.803, Anna Salai,
   Chennai-2. .. Respondents in both the Writ Appeals

Writ Appeal No.689 of 2007 filed under Clause 15 of the Letters Patent against the order of this Court, dated 10.1.2007 in W.P.No.8616 of 2004.

W.P.No.8616 of 2004 Writ of certiorarified Mandamus calling for the records of the award dated 15.12.2003 passed in ID.No.62/98 on the file of the first respondent viz. The Principal Labour Court, Chennai and quash the unallowed portion and modify the award to the effect that the petitioner is entitled to get he full back wages and other attendant benefits from the date of suspension i.e. 20.5.95 with interest at the rate of 12% p.a. and also entitled for retirement benefits with all attendant benefits along with 12% interest per annum and the petitioner/Workmen is also entitled to damages/Compensation of a reasonable amount, that may be fixed by this Court and direct the second respondent Management to pay all the above said amount.

Writ Appeal No.690 of 2007 filed under Clause 15 of the Letters Patent against the order of this Court, dated 10.1.2007 in W.P.No.17550 of 2004.

W.P.No.17550 of 2004 Writ of Certiorari to call for the records on the file of the first respondent, Principal Labour Court, chennai and to quash the impugned award dated 15.12.2003 made in I.D.62/98.

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For appellant : Mr.N.G.R.Prasad for M/s.Row & Reddy
For respondent-2 : Mr.M.Vijayan for M/s.King & Patridge

Judgment

(The Judgment of the Court was delivered by F.M.Ibrahim Kalifulla,J)

These Writ Appeals arise out of the common order of the learned single Judge dated 10.1.2007 passed in W.P.No.8616 of 2004 (in W.A.No.689 of 2007) and W.P.No.17550 of 2004 (in W.A.No.690 of 2007).

2. The appellant is a workman under the second respondent-Management and the issue relates to his non-employment at the instance of the second respondent-Management.

3. The brief facts which are required to be stated are that the appellant-workman was employed as Inspector Grade-II in the second respondent-Management, that he was stated to have put in 35 years of unblemished service, that he was issued with a charge memo dated 20.5.1995 alleging that he instigated the other workmen of the second respondent-Management not to carry out the lawful orders of the second respondent-Management to work on 1.4.1995, 3.4.1995, 4.4.1995, 9.4.1995, 16.4.1995 and 23.4.1995 by issuing hand-bills (pamphlets) and such instigation of the appellant-workman amounted to disobedience of the orders of the second respondent-Management and he also instigated the other workmen to strike work on those days, and the said conduct amounted to misconduct falling under Clause 23(a), (c) and (j) of the Certified Standing Orders of the second respondent-Management. An enquiry was ordered to be held and ultimately, an order of dismissal came to be passed against the appellant-workman on 2.2.1996. In the said order of dismissal, it was specifically mentioned that in accordance with the provisions of Section 33(2)(b) of the Industrial Disputes Act (hereinafter referred to as 'the I.D. Act'), having regard to the pendency of conciliation proceedings before the Joint Commissioner of Labour (for short, JCL), the appellant-workman was offered one month's salary in lieu of notice and the "approval application" under Section 33(2)(b) of the I.D. Act was also simultaneously filed before the JCL. The said approval application preferred by the second respondent-Management was rejected by the JCL by order dated 25.11.1996 holding that prior permission under Section 33(1)(b) of the I.D. Act ought to have been obtained and that the approval application under Section 33(2)(b) was not maintainable. Challenging the same, the second respondent-Management preferred W.P.No.19257 of 1996 before this Court and when the same was pending, the second respondent-Management preferred an application seeking permission of this Court to withdraw the very approval application filed under Section 33(2)(b) of the I.D. Act. Considering the said application of the second respondent-Management and the Writ Petition itself, an order came to be passed in that Writ Petition on 17.3.1997 permitting the second respondent-Management to withdraw the very approval application filed under Section 33(2)(b) of the I.D. Act, while leaving the legal infirmity

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raised in the said application as regard the order of dismissal, to be worked out in an appropriate industrial dispute to be raised under Section 2-A(2) of the I.D. Act (as amended by State Act). The appellant-workman challenged the said order of the learned single Judge in W.P.No.19257 of 1996 by filing Writ Appeal in W.A.No.474 of 1997. A Division Bench of this Court disposed of the Writ Appeal by judgment dated 17.12.197, directing the State Government to "refer" the issue of non-employment of the appellant-workman for adjudication before the Principal Labour Court, Chennai. The Division Bench also fixed the time limit of six months from the date of reference for the disposal of the dispute. That is how the present dispute in I.D.No.62 of 1998 came up for adjudication before the first respondent-Labour Court.

4. In the said dispute in I.D.No.62 of 1998, the appellant-workman filed a claim statement contending that the dismissal of the appellant-workman by the second respondent-Management was in violation of the provisions of Section 33 of the I.D. Act and that in any event, the misconduct alleged against the appellant was not proved with material evidence. It was also claimed that since the appellant-workman was a "protected workman", the violation under Section 33 of the I.D. Act would strike at the very root of the order of dismissal itself.

5. The claim was resisted by the second respondent-Management contending that the appellant-workman was dismissed for the act of misconduct proved in an enquiry held for that purpose and that the claim that the appellant-workman was a "protected workman" was not true.

6. Before the first respondent-Labour Court, no oral evidence was let in on the side of the second respondent-Management and the appellant-workman examined himself as W.W.1 and marked Exs.W.1 to W.8. Exs.M.1 to M.19 were marked on the side of the second respondent-Management.

7. The first respondent-Labour Court, while considering the issue of non-employment, focussed its attention on the question of merits of the misconduct alleged to have been proved by the second respondent-Management as well as the legal infirmity based on Section 33(1)(b) of the I.D. Act. As far as the merits of the misconduct are concerned, the first respondent-Labour Court reached a conclusion that the misconduct was not satisfactorily proved. On the question of violation of Section 33 of the I.D. Act also, the first respondent-Labour Court reached a conclusion that the appellant-workman being a "protected workman", the dismissal was not in accordance with law. Since the appellant-workman had already reached the age of superannuation, the first respondent-Labour Court while passing its Award on 15.12.2003, held that the appellant-workman was entitled to back wages only and that there was no scope for granting the relief of reinstatement. Ultimately, the first respondent-Labour Court, in the Award impugned before the learned single Judge, dated 15.12.2003, declared that the appellant-workman was entitled to back wages and other attendant benefits from the date of dismissal till the date of retirement.

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8. It is as against the said Award of the first respondent-Labour Court, dated 15.12.2003 in I.D.No.62 of 1998, the Writ Petitions came to be filed both by the workman and the Management and by the impugned common order passed in the Writ Petitions, the learned single Judge took the view that the findings of the first respondent-Labour Court as regards the merits of the misconduct were perverse and that it ought not to have re-appraised the evidence let in the domestic enquiry. In the conclusion of the learned single Judge, the findings of the first respondent-Labour Court as regards the merits of the misconduct were wholly illegal and therefore, the same called for interference. As far as the violation of Section 33 of the I.D. Act is concerned, the learned single Judge took the view that when the dispute has been referred to under Section 10 of the I.D. Act, the first respondent-Labour Court ought not to have examined any violation of Section 33 of the I.D. Act in such a dispute.

9. Assailing the common order of the learned single Judge, learned counsel appearing for the appellant-workman contended that both the reasonings of the learned single Judge for interfering with the impugned Award of the first respondent-Labour Court were not justified. According to the learned counsel, having regard to Section 11-A of the I.D. Act, the first respondent-Labour Court was fully empowered to examine as to whether the claim of the second respondent-Management that the dismissal of the appellant-workman for the act of misconduct proved in an enquiry held for that purpose, was wide open for consideration and therefore, the first respondent-Labour Court was justified in re-appreciating the whole evidence in order to find out whether the stand of the second respondent-Management on the merits of the misconduct was correct or not. As far as the violation of Section 33 of the I.D. Act is concerned, the learned counsel for the appellant-workman relied upon the Constitution Bench decision of the Supreme Court reported in 2002 (2) SCC 244 (Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. vs. Ram Gopal Sharma) and in particular, paragraph 15 of the decision and contended that in the light of the said decision of the Supreme Court, in the event of violation of Section 33 of the I.D. Act demonstrated before the first respondent-Labour Court, the Labour Court was fully justified in granting the relief as has been done in the impugned Award and the learned single Judge ought not to have interfered with the same.

10. As against the above submissions, learned counsel appearing for the second respondent-Management contended that in the case on hand, there was no violation of Section 33 of the I.D. Act, inasmuch as, as on the date of dismissal, namely 2.2.1996, no conciliation proceeding was pending before the JCL and therefore, the failure to either seek for an approval under Section 33(2)(b) of the I.D. Act or prior permission under Section 33(1)(b) of the I.D. Act, was not required. The learned counsel appearing for the second respondent-Management by referring to the earlier order of the learned single Judge in W.P.No.19257 of 1996, dated 17.3.1997, contended that realising the fact that no conciliation proceeding was

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pending as on 2.2.1996, inasmuch as the conciliation proceeding, as a matter of fact, commenced only on 17.9.1996, the second respondent-Management sought the permission of this Court to withdraw the very approval application filed under Section 33(2)(b) of the I.D. Act, which was filed by mistake and therefore, the alleged violation of Section 33 of the I.D. Act cannot be a ground for interfering with the order of dismissal passed against the appellant-workman. As far as the merits of the misconduct are concerned, learned counsel for the second respondent-Management contended that the findings of the first respondent-Labour Court on the merits of the misconduct were wholly perverse and therefore, there was every justification in the order of the learned single Judge in having interfered with the said Award of the first respondent-Labour Court.

11. Having considered the respective submissions of the learned counsel as well as the material papers placed before us, as regards the contention based on Section 33 of the I.D. Act is concerned, at the outset, we wish to state that in the light of the Constitution Bench decision of the Supreme Court reported in 2002 (2) SCC 244 (Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. vs. Ram Gopal Sharma), it will have to be held that the violation of Section 33 of the I.D. Act either falling under Section 33(2)(b) or under Section 33(1)(b) would ipso-facto render the order of dismissal void and inoperative. In fact, the question dealt with by the Supreme Court in that case was that, "If the approval is not granted under Section 33(2)(b) of the Industrial Disputes Act, 1947, whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under Section 33(2)(b) would not render the order of dismissal inoperative?" While dealing with the said question, the Supreme Court referred to its earlier Constitution Bench decision reported in the case of AIR 1963 SC 1756 = 1964 (2) SCR 104 (P.H.Kalyani vs. Air France, Calcutta) as well as one other decision of the Supreme Court reported in AIR 1966 SC 380 = 1965 (3) SCR 411 (Tata Iron and Steel Co. Ltd. vs. S.N.Modak) and the Constitution Bench of the Supreme Court ultimately held as under in paragraph 15 in 2002 (2) SCC 244 (cited supra):

> "15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory

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obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceedings by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

12. In fact, in AIR 1966 SC 380 = 1965 (3) SCR 411 (Tata Iron and Steel Co. Ltd. vs. S.N.Modak), the Supreme Court has held as under in paragraph 11:

"11. .... order of dismissal or discharge being incomplete and incohate until the approval is obtained, cannot effectively terminate the relationship of the employer and employee and that if the approval is not accorded by the Tribunal, the employer would be bound to treat the respondent as its employee and paying his full wages for the period even though the employer may subsequently proceeded to terminate the services of the respondent. ..."

13. In the light of the above said legal proposition as stated with regard to the violation of Section 33(2)(b) of the I.D. Act and having regard to the implications of Section 33(1)(b) of the I.D. Act, we are of the considered opinion that whatever that has been stated in relation to violation of Section 33(2)(b) of the I.D. Act would ipso-facto be applicable in respect of the provisions contained in Section 33(1)(b) of the I.D. Act.

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14. When we consider the case on hand in the above said legal position as regards violation of Section 33 of the I.D. Act, according to the appellant-workman, since even as per the order of dismissal, the second respondent-Management claimed that the conciliation proceedings were pending before the JCL as on the date of dismissal, namely 2.2.1996, its failure to comply with the said statutory obligation, would render the order of dismissal void and inoperative. As far as the said contention is concerned, on behalf of the second respondent-Management, it was contended that as on the date of dismissal, namely 2.2.1996, there was no conciliation proceeding pending. In support of the said stand, sole reliance was placed upon the order of the learned single Judge dated 17.3.1997 passed in W.P.No.19257 of 1996, wherein the learned single Judge, while considering the second respondent-Management's application seeking permission to withdraw the very approval application itself filed under Section 33(2)(b) of the I.D. Act, stated in paragraph 6 to the effect that, " ... It is further seen that the conciliation proceedings on the petitioner management under Section 33 would commence only on 17.9.1996 whereas the petitioner management dismissed the second respondent from services of the petitioner Company on 2.2.1996. On the date of dismissal there was no conciliation proceedings pending and the petitioner management filed approval petition before the first respondent by way of abundant caution. ....". Though the learned single Judge in W.P.No.19257 of 1996, stated so in the said order, ultimately, while permitting the second respondent-Management to withdraw the very approval application filed under Section 33(2)(b) of the I.D. Act, the learned single Judge made it clear that the very contention of the appellant-workman as regards the legal infirmity, namely the violation of Section 33 of the I.D. Act, can be agitated by the appellant-workman in the dispute which could be raised under Section 2-A(2) of the I.D. Act. While reserving the said liberty to the appellant-workman, the learned single Judge has stated the same in the following words in paragraph 7 in W.P.No.19257 of 1996:

> "7. ... As a matter of fact the alleged defect in the order of dismissal of the second respondent by the petitioner can be made use of by the second respondent in the proceedings to be initiated in accordance with law. As a matter of fact the learned counsel for the petitioner has submitted that it is always open to the second respondent to challenge the order of dismissal in accordance with the provisions of the Act more particularly Section 2-A(2) and it is open to the second respondent to make use of the alleged infirmity in the order of dismissal".

15. In the light of the said liberty made available to the appellant-workman while permitting the second respondent-Management to withdraw the approval application filed under Section 33(2)(b) of the I.D. Act, we are of the considered opinion that it was incumbent upon the second

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respondent-Management to have demonstrated before the first respondent-Labour Court that there was no necessity for compliance of Section 33 of the I.D. Act when the order of dismissal was passed as against the appellant-workman on 2.2.1996 itself.

16. On a perusal of the Award impugned in the Writ proceedings, we find that though the second respondent-Management claimed in the affidavit filed in support of Writ Petition No.17550 of 2004 challenging the impugned Award that the notice for conciliation was issued only on 9.9.1996 calling for a meeting on 17.9.1996, none of the notices which emanated from the office of the JCL was placed before the first respondent-Labour Court. Though the learned counsel for the second respondent-Management would contend that having regard to the fact that the appellant-workman raised the plea of violation of Section 33 of the I.D. Act, the burden was upon him to have proved the same to the satisfaction of the first respondent-Labour Court with particular reference to the issuance of the notices by the Conciliation Officer, we are of the considered opinion that the appellant-workman having raised the plea before the first respondent-Labour Court that there was a violation of the provisions of Section 33 of the I.D. Act with a pointed reference to the violation under Section 33(2)(b) of the I.D. Act, and when the second respondent-Management took the stand that as on the date of dismissal, namely 2.2.1996, there was no conciliation proceeding pending, the burden was only on the second respondent-Management to have established the said fact. In fact, on a perusal of the counter statement filed before the first respondent-Labour Court in the dispute in I.D.No.62 of 1998, the second respondent-Management has not even refuted the allegation of violation of Section 33 of the I.D. Act as raised by the appellant-workman in the claim statement. In this context, it will be relevant to note that in the very order of dismissal passed against the appellant-workman, dated 2.2.1996, the second respondent-Management stated in so many words that in the light of the pending conciliation proceedings before the JCL, one month's notice pay was being paid in compliance of Section 33(2)(b) of the I.D. Act which itself, was sufficient to support the stand of the appellant-workman that the compliance of Section 33 of the I.D. Act became imperative as on the date of dismissal. If the said claim of the appellant-workman were to be dislodged, the second respondent-Management ought to have placed all the necessary materials to prove the contrary. To our dismay, the second respondent-Management has miserably failed to discharge the said burden before the first respondent-Labour Court. Therefore, we are convinced that the violation of Section 33 of the I.D. Act as alleged by the appellant-workman before the first respondent-Labour Court, was fully established and consequently, the ultimate conclusion of the first respondent-Labour Court on that score cannot be found fault with. The reasoning of the learned single Judge that in a dispute raised under Section 10 of the I.D. Act, the violation of Section 33 of the I.D. Act cannot be gone into, is not legally sustainable and therefore, the said reasoning of the learned single Judge cannot also be accepted.

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17. As far as the merits of the misconduct are concerned, when we peruse the impugned Award of the first respondent-Labour Court, we find that the Labour Court took the view that the witnesses examined in support of the charges were all interested witnesses, that only in the domestic enquiry, the Management witnesses deposed about the pamphlets issued by the appellant-workman inside the factory premises and the Labour Court took an exception to the contents of the notices issued by the second respondent-Management under Ex.M-16 series that the actual place in which the pamphlets were distributed was not specifically mentioned, though the Management witnesses specifically referred to the actual place of distribution of the pamphlets by the appellant-workman. We are afraid that on that score, there was any justification for the first respondent-Labour Court to have inferred that the misconduct alleged against the appellant-workman was not made out, in the absence of any other motive for the witnesses to have deposed against the appellant-workman. In fact, the discussion by the first respondent-Labour Court on the merits of the misconduct was very slender and in an abrupt manner, the first respondent-Labour Court has reached the conclusion that the evidence let in on the side of the Management was not sufficient to prove the act of misconduct. Therefore, we are not convinced as regards the said conclusion of the Labour Court in holding that the misconduct levelled against the appellant-workman was not proved.

18. However, since the violation of Section 33 of the I.D. Act struck at the very root of the order of dismissal itself, with which conclusion of the first respondent-Labour Court, we fully concur, we hold that the Award of the first respondent-Labour Court ought not to have been interfered with by the learned single Judge on that score.

19. After reaching the above said conclusion, when we come to the question of the relief part of the Award of the first respondent-Labour Court, we wish to be guided by the decision of the Supreme Court reported in 2005 (5) SCC 124 (Allahabad Jal Sansthan vs. Daya Shankar Rai), wherein the Supreme Court stated the legal position as under in paragraphs 6 and 16:

> "6. A law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. It is not in dispute that Respondent 1 herein was appointed on an ad hoc basis; his services were terminated on the ground of a policy decision, as far back as on 24-1-1987. Respondent 1 had filed a written statement wherein he had not raised any plea

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that he had been sitting idle or had not obtained any other employment in the interregnum. The learned counsel for the appellant, in our opinion, is correct in submitting that a pleading to that effect in the written statement by the workman was necessary. Not only no such pleading was raised, even in his evidence, the workman did not say that he continued to remain unemployed. In the instant case, the respondent herein had been reinstated from 27-2-2001."

"16. We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realised that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at."

20. In the case on hand, after the order of dismissal dated 2.2.1996, there is nothing to suggest that the appellant-workman remained unemployed throughout till he reached the age of superannuation on 15.5.2000. As far as the act of misconduct is concerned, we had our own reservations as regards the findings of the first respondent-Labour Court. The misconduct related to instigation of the other workmen not to carry on the lawful orders of the Management in reporting for work on certain specified dates and considering the said act of misconduct alleged against the appellant-workman, we are of the considered opinion that the interest of justice would be subserved by modifying the Award of the first respondent-Labour Court by reducing the back wages alone to an extent of 75%, apart from directing the second respondent-Management to pay the other attendant benefits, namely Gratuity and Provident Fund.

21. Therefore, having regard to our conclusions in these Writ Appeals, modifying the Award of the first respondent-Labour Court to the one of 75% back wages + Gratuity + Provident Fund, we permit the appellant-workman to withdraw the balance amount if any, is remaining in the Court deposit to the credit of I.D.No.62 of 1998 and if anything more by way of 75% of back wages is payable by the second respondent-Management to the appellant-workman over and above the amount lying in deposit, the second respondent-Management is directed to calculate the same and pay the balance amount to the appellant-workman within eight weeks from the date of receipt of a copy of this judgment, along with the Gratuity and the Provident Fund payable to the appellant-workman.

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22. The Writ Appeals are disposed of on the above terms. No costs.

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Sub Asst. Registrar.

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The Presiding Officer,
Principal Labour Court,
Chennai-104.

+ 1 CC To M/s.Row and Reddy, Advocate SR NO.52444

+ 1 CC To M/s.King and Patridge, Advocate SR NO.52473

W.A.Nos.689 and 690 of 2007

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